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16 **IN THE UNITED STATES DISTRICT COURT
17 FOR THE DISTRICT OF ARIZONA**

18 Esteban Arciniega,

19 Case No.: 2:23-cv-00245-SPL

20 Plaintiff,

21 v.

22 Experian Information Solutions, Inc.,
23 Equifax Information Services, LLC, Trans
24 Union, LLC, BLST Receivables &
25 Servicing, LLC d/b/a Fingerhut,
26 Defendants.
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**PLAINTIFF'S OPPOSITION TO
DEFENDANT EXPERIAN
INFORMATION SOLUTIONS, INC.'S
MOTION TO COMPEL
ARBITRATION**

29 **I. INTRODUCTION**

30 The immediate litigation is brought before the Court under the Fair Credit Reporting
31 Act (“FCRA”). Plaintiff Esteban Arciniega (“Plaintiff”) was the victim of inaccurate
32 consumer reporting at the hands of Defendant Experian Information Solutions, Inc.
33 (“Experian”). Plaintiff alleges claims against Experian under 15 U.S.C. §§ 1681e(b) and

1 1681i. In the immediate motion, Experian argues the dispute between Plaintiff and Experian
 2 should be compelled to arbitration based on an allegedly applicable arbitration agreement
 3 (the “ECS Arbitration Agreement¹”). As detailed herein, the ECS Arbitration Agreement is
 4 both substantively and procedurally unconscionable. Therefore, the Court should deny
 5 Experian’s Motion to Compel Arbitration (the “Motion”) and allow Plaintiff to continue to
 6 litigate his claims against Experian in this Court.

7 **II. LEGAL STANDARD**

8 In evaluating arbitration agreements, federal district courts must apply state-law
 9 contract principles. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir.
 10 2003) (cleaned up) (“To evaluate the validity of an arbitration agreement, federal courts
 11 should apply ordinary state-law principles that govern the formation of contracts”).

12 Under Arizona law “[a]n unconscionable contract is unenforceable.” *Clark v.*
 13 *Renaissance W., LLC*, 307 P.3d 77, 79 (Ariz. Ct. App. 2013). “A contract may be
 14 procedurally unconscionable and/or substantively unconscionable.” *Cooper v. QC Fin.*
 15 *Services*, 503 F. Supp. 2d 1266, 1278 (D. Ariz. 2007) (citing *Maxwell v. Fidelity Financial*
 16 *Services, Inc.*, 184 Ariz. 82, 89-90, 907 P.2d 51 (1995)).

17 “Procedural unconscionability is concerned with unfair surprise, fine print clauses,
 18 mistakes or ignorance of important facts or other things that mean bargaining did not
 19 proceed as it should.” *Jones v. Bank of Am., N.A.*, No. CV-09-2129-PHX-JAT, 2010 U.S.
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 26 ¹ For ease of reading, throughout this opposition memorandum, Plaintiff will refer to the
 27 allegedly applicable arbitration agreement at issue in Experian’s motion as the “ECS
 28 Arbitration Agreement,” however, Plaintiff asserts the modifier “allegedly applicable” in
 each instance.

1 Dist. LEXIS 71848, at *29-30 (D. Ariz. June 22, 2010) (cleaned up). “Under the procedural
2 rubric, courts examine factors influencing the bargaining process: ‘the real and voluntary
3 meeting of the minds of the contracting party: age, education, intelligence, business acumen
4 and experience, relative bargaining power … [and] whether there were alternative sources
5 of supply of the goods in question.’” *Sw. Pet Prods. v. Koch Indus.*, 107 F. Supp. 2d 1108,
6 1113 (D. Ariz. 2000) (quoting *Maxwell*, 184 Ariz. at 89-90).

7 “Substantive unconscionability looks at ‘the actual terms of the contract and
8 examines the relative fairness of the obligations assumed.’” *Jones*, 2010 U.S. Dist. LEXIS
9 71848, at *29-30 (quoting *Maxwell*, 184 Ariz. at 89). “Substantive unconscionability occurs
10 when there are ‘contract terms so one-sided as to oppress or unfairly surprise an innocent
11 party, an overall imbalance in the obligations and rights imposed by the bargain, and
12 significant cost-price disparity.’” *Jones*, 2010 U.S. Dist. LEXIS 71848, at *29-30 (quoting
13 *Maxwell*, 184 Ariz. at 89).

14 **III. ARGUMENT**

15 **A. The ECS Arbitration Agreement is Substantively Unconscionable
16 Because it is Substantially One-Sided Such That Enforcement Would
17 Lead to Oppressive and Unfair Surprise**

18 The ECS Arbitration Agreement is substantively unconscionable under Arizona law.
19 Due to frankly shocking overbreadth, the ECS Arbitration Agreement, as written, would
20 require Plaintiff to arbitrate any conceivable claim he might have against an incalculable
21 number of entities completely unknown to him at the time of the “agreement” between
22 Plaintiff and a complete non-party to this action. Enforcement of the ECS Arbitration
23 Agreement would lead to absurd results, constituting oppression and unfair surprise.
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1 Accordingly, the Court should hold that the ECS Arbitration Agreement is substantively
2 unconscionable and therefore unenforceable.
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4 In Arizona, substantive unconscionability is present “when the terms of the contract
5 are so one-sided as to be overly oppressive or unduly harsh to one of the parties.” *Clark v.*
6 *Renaissance West, LLC*, 307 P.3d 77, 79 (Ariz. Ct. App. 2013). Arizona law directs courts
7 to evaluate “the fairness of the terms of the contract itself” when determining substantive
8 unconscionability. *Id.* One primary and “[r]elevant factor[] [is] whether the contract terms
9 are so one-sided as to oppress or unfairly surprise an innocent party...” *Dueñas v. Life Care*
10 *Ctrs. of Am., Inc.*, 336 P.3d 763, 769 (Ariz. Ct. App. 2014).

11 In the case at hand, in or around February 2023, Plaintiff allegedly entered into an
12 agreement with non-party CreditWorks, a credit **monitoring** service provided by Experian
13 Consumer Services (“ECS”). To gain access to CreditWorks, Plaintiff was required to agree
14 to a Terms of Use (“TOU”) agreement. [Dkt. No. 27-1, at 2] (“Williams Decl.”). The TOU
15 is a single-spaced, approximately forty-five (45) page long document, and includes the ECS
16 Arbitration Agreement among its many provisions. By agreeing to the TOU, Experian
17 contends that Plaintiff agreed to arbitrate every conceivable claim he may have at any point
18 – whether sounding in tort, contract, fraud, or otherwise – against **any** affiliate of ECS,
19 regardless of whether Plaintiff is aware of the affiliation, how remote the affiliation may be,
20 or any other factor. While not defined by the TOU, “affiliate” is understood to mean “[a]
21 corporation that is related to another corporation by shareholdings or other means of control;
22 a subsidiary, parent, or sibling corporation.” Affiliate, Black's Law Dictionary 59 (7th ed.
23 1999).
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1 Experian contends that it is an affiliate of ECS by virtue of the fact that both Experian
2 and ECS have the same ultimate parent company, Experian plc. Williams Decl., at 2.
3 Experian plc is a multinational conglomerate boasting an ownership interest in dozens of
4 entities in the United States, South America, Europe, and Africa. These entities operate
5 across several different industries, including healthcare, technology, banking, and finance.
6 If Experian's view is correct, **any** company ultimately owned by Experian plc can compel
7 Plaintiff to arbitration for **any** claim he may have at any point in the future. To demonstrate
8 the perverse results which follow from this shocking overbreadth, a hypothetical is
9 instructive. If Plaintiff were vacationing in Brazil and was hit by a car, only to learn that the
10 vehicle which struck him happened to be owned by MOVA Sociedade de Empréstimo entre
11 Pessoas S.A. ("MOVA") – an Experian-owned company located in Brazil² – MOVA could
12 compel Plaintiff's personal injury suit to arbitration using the ECS Arbitration Agreement.
13 Surely, this outcome is one of "oppress[ion]" and "unfair surprise," and not one that any
14 consumer could **ever** reasonably foresee when agreeing to receive credit monitoring
15 services. *Dueñas*, 336 P.3d at 769.

16 Beyond the absurdity of being forced into arbitration for unrelated claims with ECS'
17 many affiliates, there are somehow even more problematic elements found in the ECS
18 Arbitration Agreement. Specifically, the definitions incorporated into ECS Arbitration
19 Agreement are broad enough that the number of parties who could potentially compel
20 arbitration thereunder numbers in the **millions** – if not more. The full list of parties Experian
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² <https://www.experianplc.com/media/latest-news/2022/experian-agrees-to-acquire-majority-stake-in-mova/>

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1 contends can enforce the ECS Arbitration Agreement is as follows: “our respective parent
2 entities, subsidiaries, affiliates (including, without limitation, our service providers), agents,
3 **employees**, predecessors in interest, successors and assigns, websites of the foregoing, as
4 well as **all authorized or unauthorized users or beneficiaries of Services and/or**
5 **Websites or information** under this or prior Agreements between us relating to Services
6 and/or Websites.” Williams Decl., at 16 (emphasis added). An additional hypothetical is
7 again instructive to show the absurd results which follow from the overbreadth of the ECS
8 Arbitration Agreement. Suppose Plaintiff has a neighbor who happens to be employed by
9 ECS. Now suppose Plaintiff and his neighbor have a dispute over where each party’s
10 property line ends. Again, Plaintiff’s neighbor could compel this real property dispute to
11 arbitration using the ECS Arbitration Agreement.
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14 Furthermore, under the terms of the ECS Arbitration Agreement, apparently even
15 **users** – meaning other customers – can enforce the ECS Arbitration Agreement, whether
16 those users are “authorized or unauthorized.” *Id.* Embracing Experian’s view means
17 Plaintiff is subject to arbitration under the ECS Arbitration Agreement with respect to **any**
18 claim he has at any time against users of the “Services” and/or “Websites.” *Id.* The term
19 “Websites” is broadly defined to include “any affiliated website (including, but not limited
20 to, Experian.com, FreeCreditReport.com, FreeCreditScore.com, CreditReport.com,
21 Creditchecktotal.com, CreditScore.com, usa.experian.com, and
22 experian.experiandirect.com)...” *Id.*, at 10. Therefore, under Experian’s view, a literal
23 reading of the ECS Arbitration Agreement allows for enforcement by any customer of
24 Experian – a nationwide credit bureau with tens of millions of customers. This scenario is
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1 nothing if not “oppress[ive]” and “unfair” and an absolutely unreasonable result. *Dueñas*,
2 336 P.3d at 769; *See also Custom Roofing Co. v. Transamerica Ins. Co.*, 120 Ariz. 196, 198
3 (Ariz. Ct. App. 1978) (“An interpretation of a contract which renders it unreasonable should
4 be avoided.”) (citing *Employer's Liability Assurance Corp. v. Lunt*, 82 Ariz. 320, 313 P.2d
5 393 (1957); *Graver Tank Manufacturing Co. v. Fluor Corp.*, 4 Ariz. App. 476, 421 P.2d
6 909 (1967)).

7 Surely, no consumer in existence would reasonably believe that by signing up for
8 credit monitoring services, the consumer was agreeing to go to arbitration for a personal
9 injury lawsuit in Brazil or for a real property dispute with the consumer’s neighbor.
10 Experian no doubt understands this, and rather than address the appalling overbreadth of
11 the ECS Arbitration Agreement, Experian will likely argue: 1) Plaintiff’s hypotheticals are
12 absurd and thus should be ignored in favor of only looking at the facts of this case; and, 2)
13 the absurdities resulting from Plaintiff’s hypotheticals are easily resolved because the
14 disputes are clearly not within the scope of the ECS Arbitration Agreement, and therefore
15 not subject to arbitration.
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17 With respect to the position that the “absurd” hypotheticals should not be considered
18 when evaluating an arbitration agreement, the Ninth Circuit recently rejected this argument
19 in *Revitch v. DIRECTV, LLC* (977 F.3d 713 (9th Cir. 2020)) when evaluating a Fourth
20 Circuit opinion on a similar issue:
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22 ...the majority [of the relevant Fourth Circuit panel] contends that in
23 evaluating the soundness of [the defendant’s] preferred interpretation of the
24 arbitration clause, it would be inappropriate for a court to consider the
25 “troubling hypothetical scenarios” to which such an interpretation could give
26 rise. [...] [O]ur consideration of hypotheticals [...] very much does inform
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1 the question now before the court. [...] [W]e employ hypotheticals to discern
2 whether the mutual intent of the parties could have been to form an
3 agreement to arbitrate any and all disputes that might ever arise between [the
4 plaintiff] and yet-unknown affiliates such as [the defendant], no matter how
5 unrelated to [the third party cousin-company's] provision of cellular phone
6 service, including but not limited to the [federal consumer statutory] claim
7 presented here.

8 *Id.*, at 720. The hypotheticals proposed by Plaintiff here are therefore informative and
9 appropriate for consideration when analyzing the underlying question: Could Plaintiff have
10 possibly foreseen the staggering breadth of Experian's interpretation of the ECS Arbitration
11 Agreement at the time he signed up for CreditWorks?

12 With respect to any questions of scope, Experian will no doubt point to the "arising
13 out of or relating to" language from the ECS Arbitration Agreement, and dismissively
14 explain that personal injury and/or real property lawsuits clearly are not contemplated by
15 the ECS Arbitration Agreement. This is precisely the problem, and a clear case of Experian
16 wanting to have its cake and eat it too. As explained clearly in Experian's motion, "if there
17 is any dispute as to the arbitrability of Plaintiff's claims, an arbitrator is to resolve such
18 issues." [Dkt. No. 27, at 4]. Plaintiff would no doubt argue in a personal injury suit – as
19 Plaintiff intends to do here if compelled to arbitration – that his claim is not arbitrable under
20 the ECS Arbitration Agreement. However, accepting Experian's position means that
21 MOVA could successfully argue that an arbitrator would need to make a determination on
22 whether Plaintiff's personal injury claim was arbitrable. Plaintiff would then be forced to
23 wait months for an arbitrator to be assigned, petition for a threshold hearing on the question
24 of arbitrability, and – if granted – could only proceed in court several months later.

1 These hypotheticals serve to highlight the fact that the ECS Arbitration Agreement
2 is undoubtedly substantively unconscionable on its face, and therefore unenforceable. *See*
3 *Cooper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1278 (D. Ariz. 2007) (“The
4 Arizona Supreme Court has held that ‘a claim of unconscionability can be established with
5 a showing of substantive unconscionability **alone**...’”) (quoting *Maxwell*, 907 P.2d at 59).

6 However, Experian’s attempt to enforce the ECS Arbitration Agreement in this
7 utterly unrelated case is itself a prime example of why the ECS Arbitration Agreement is
8 “oppressi[ve] and [an] unfair surprise.” *Dueñas*, 336 P.3d at 769. Plaintiff sought
9 CreditWorks for the purposes of monitoring his credit report. He was not seeking consumer
10 reporting services, nor could he seek such services from CreditWorks, as ECS does not
11 offer any such services. The harms befallen Plaintiff leading to the immediate litigation are
12 wholly unrelated to the credit monitoring services Plaintiff received from CreditWorks.
13 Experian’s motion is a transparent attempt to piggyback on Plaintiff’s agreement with a
14 separate entity which – purely by happenstance – is owned by the same ultimate parent
15 company as Experian. The expectation that Plaintiff should arbitrate with Experian because
16 of this happenstance is indeed an unfair surprise. *Id.* In short, the ECS Arbitration
17 Agreement is of the kind that Professor Horton has gravely warned of:

18 “Infinite arbitration clauses exhibit one or more of the following characteristics.
19 First, they are ‘not limited to disputes arising from or related to the transaction or
20 contract at issue.’ For instance, Wells Fargo’s customers agree to arbitrate ‘[a]ny
21 unresolved disagreement,’ and Steiner’s arbitration clause covers ‘all disputes,
22 claims or controversies whatsoever.’ Thus, infinite provisions attempt to govern
23 conduct that has nothing to do with the original transaction, such as sexual
24 harassment after the purchase of household goods or ‘a punch in the nose during a
25 dispute over medical billing.’ Second, infinite clauses extend beyond the original
26 contractual partners. Like Mobility’s Customer Agreement--which applies to the
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1 parties’ ‘subsidiaries, affiliates, agents, employees, predecessors in interest,
 2 successors, and assigns, as well as all authorized or unauthorized users’--infinite
 3 clauses govern all persons or entities with a connection to the container contract.
 4 Third, infinite provisions have no sunset date. Although the common law condemns
 5 perpetual contracts, infinite clauses ‘survive the closing of [an] account or
 6 termination of any service.’ [...] **They are less a contractual provision and more**
 7 **a kind of arbitration servitude.”**

8 David Horton, *Infinite Arbitration Clauses*, 168 U. Pa. L. Rev. 633, 652 (2020).

9 This “infinite arbitration clauses” moniker and Professor Horton’s 2020 publication
 10 by the same name were recently discussed in some detail by the Ninth Circuit. *See Revitch*,
 11 977 F.3d 713. In affirming the lower court’s denial of the motion to compel arbitration, the
 12 Ninth Circuit noted the limitless breadth of the arbitration “agreement” at issue would lead
 13 to “absurd results” including [the plaintiff being] forced to arbitrate any dispute with any
 14 corporate entity that happens to be acquired by [defendant’s parent company], even if
 15 neither the entity nor the dispute has anything to do with providing [the contractual] services
 16 to [plaintiff]...”. *Id.*, at 717.

17 The notion that Plaintiff’s agreement to receive credit monitoring services –
 18 including agreement to the ECS Arbitration Agreement – included an agreement to arbitrate
 19 with millions of parties, the identities of whom are unknowable to Plaintiff, is just such an
 20 “absurd result[]”. *Id.* The overbreadth of the ECS Arbitration Agreement further makes this
 21 provision “oppress[ive]” and “unfair” in its one-sidedness. *Dueñas*, 336 P.3d at 769. The
 22 only party to this case which could have conceivably known the identity of all who could
 23 apparently enforce the ECS Arbitration Agreement at the time of the “agreement” was
 24 Experian. Plaintiff had no way of knowing which – or how many – parties are considered
 25 “affiliates,” “employees,” or “authorized users” of the “Services” and/or “Websites”
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1 defined in the ECS Arbitration Agreement. It is difficult to imagine a more “one-sided”
2 contractual provision than a provision which only one-side can conceivably or reasonably
3 understand. Accordingly, the Court should intercede and hold that the ECS Arbitration
4 Agreement is substantively unconscionable and therefore unenforceable.
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6 **B. The Totality of the Circumstances Surrounding Plaintiff’s Agreement to
7 the ECS Arbitration Agreement Were Procedurally Unconscionable**

8 In Arizona, “Procedural or process unconscionability is concerned with ‘unfair
9 surprise,’ fine print clauses, mistakes or ignorance of important facts or other things that
10 mean bargaining did not proceed as it should.” *Maxwell*, 184 Ariz. at 88–89 (quoting 2 Dan
11 B. Dobbs, Law of Remedies § 10.7, at 706 (2d ed. 1993)). “Additionally, the ability of a
12 party to alter the printed terms of a contract is a relevant factor in determining procedural
13 unconscionability.” *Nickerson v. Green Valley Recreat.*, 265 P.3d 1108, 1118 (Ariz. Ct.
14 App. 2011).

15 Based on the totality of the circumstances, the ECS Arbitration Agreement is
16 procedurally unconscionable. ECS is allegedly an affiliate of Experian under the shared
17 umbrella of a massive conglomerate with over 20,000 employees and annual revenues of
18 over \$5 billion. Plaintiff was required to agree to the TOU, despite the fact that he was never
19 required to view and/or read the TOU before making such an agreement. Williams Decl.,
20 at 3 (emphasis added) (“The phrase “Terms of Use Agreement” in the disclosure was off-
21 set in blue text and, **if clicked**, would have presented the consumer with the full text of the
22 agreement.”). Moreover, there was no alternative to the ECS Arbitration Agreement, and
23 Plaintiff had no ability to bargain with ECS (or with Experian, whom he had no possible
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1 way of knowing would attempt to force arbitration in a wholly unrelated lawsuit arising
2 under federal law). To that end, the TOU specifically states: **“IF YOU DO NOT AGREE**
3 **WITH ANY OF THESE TERMS OR CONDITIONS, DO NOT USE, ACCESS OR**
4 **ORDER ANY SERVICE OR ACCESS OR USE THE WEBSITES.”** Williams Decl., at
5 11. In other words, if Plaintiff wished use the CreditWorks service, he had one option and
6 one option only: agree to the cumbersome TOU, including the “infinite” ECS Arbitration
7 Agreement. In order to understand the full extent of why these circumstances present such
8 a problem for consumers, a broader view of the credit landscape is required.

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11 In 2023, a consumer’s credit score and credit history are more important than ever.
12 Poor credit scores or derogatory marks in a consumer’s credit history can cause a consumer
13 to be denied a mortgage, an automobile loan, a rental application, an employment position,
14 or even enrollment in a higher education institution. In short, the difference between a good
15 and bad credit history can mean a dramatically better – or worse – life for a consumer.
16 Consequently, it stands to reason that the vast majority of consumers know that they have
17 a substantial interest in staying informed about their credit.

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19 Consumers can retrieve their credit reports from Experian and the other two major
20 credit bureaus – Experian’s co-defendants Equifax Information Services, LLC (“Equifax”)
21 and Trans Union, LLC (“Trans Union”) – for free from AnnualCreditReport.com (“ACR”)
22 once per year. However, the credit reports provided by ACR do not include a credit score,
23 and furthermore leave the consumer unaware of the contents of their credit reports for the
24 other 364 days each year. Therefore, most consumers seek out other free methods to stay
25 up-to-date concerning their credit. One such avenue is the popular app CreditKarma,
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1 through which consumers can check their credit score and full credit report daily. However,
2 CreditKarma provides credit scores and credit reports for **only** Equifax and Trans Union.
3 Experian's conspicuous absence from CreditKarma is, of course, deliberate. Instead,
4 Experian pushes consumers toward its own "free" product – including through the use of
5 aggressive marketing, complete with John Cena advertisements and a prominent national
6 campaign – in order to accomplish dual goals. First, Experian is able to gather data on
7 consumers, then turn around and sell that data for a profit. Second, Experian ensures that
8 the consumer unknowingly bargained away their right to litigate and has forever bound
9 themselves to arbitrate any conceivable claim they may have against Experian. It is
10 unsurprising that there is no free service in existence through which a consumer can
11 regularly check their Experian credit report without being forced to arbitrate all possible
12 claims against Experian. For this reason, it becomes painfully clear that for consumers who
13 want to be proactive concerning their credit – including their Experian credit report – the
14 "option" of simply not using the CreditWorks website is at best a Hobson's choice.
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16 Moreover, the TOU states it can be unilaterally modified at any time. Williams Decl.,
17 at 13 ("AMENDMENTS"). Therefore, it is feasible that even if Plaintiff read each and every
18 term of the TOU, he could be bound tomorrow to completely different terms. Given the
19 sophistication of Experian as contrasted with Plaintiff – along with Experian's ability to
20 modify the ECS Arbitration Agreement at any time, and unilaterally – it is evident that there
21 was no "bargaining" as is required for a conscionable contract in Arizona. *Maxwell*, 184
22 Ariz. at 89; *see also Nickerson*, 265 P.3d at 1118.
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1 Furthermore, “infinite” arbitration clauses like the one found in the ECS Arbitration
2 Agreement are contrary to public policy, and deeply harmful to American jurisprudence. It
3 is no secret that the lengthy contracts consumers regularly agree to in exchange for services
4 like CreditWorks are often ignored by the consumer entirely, or otherwise go unread.
5 However, “they trust to the good faith of the party using the form and to the tacit
6 representation that like terms are being accepted regularly by others similarly situated.”
7 *Nationstar Mortg., LLC v. West*, 237 W. Va. 84, 89, 785 S.E.2d 634, 639 (2016).
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9 This issue was recently discussed by the Fourth Circuit in *Mey v. DIRECTV, LLC*
10 (971 F.3d 284 (4th Cir. 2020)). Therein, Judge Harris – in his dissent later relied upon by
11 the lower court on remand to find unconscionability and setting forth the basic holdings of
12 the late Ninth Circuit decision in *Revitch*, discussed above – eloquently stated “[n]o
13 reasonable person procuring cell-phone service from AT&T Mobility and reading the
14 attendant arbitration clause would understand ‘affiliate’ to include any and all future
15 corporate cousins, as yet unidentifiable, and regardless of whether their relationship with
16 AT&T Mobility would have anything to do with the provision of services under her cell-
17 phone contract.” *Mey*, 971 F.3d at 303 (Harris, J., dissenting).
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19 It is worth noting that the arbitration clause in *Mey* – ultimately held to be
20 unconscionably overbroad on remand – was **less overbroad** than the ECS Arbitration
21 Agreement. The arbitration clause at issue in *Mey* did not include customers as parties who
22 could enforce the arbitration clause, while the ECS Arbitration Agreement contains
23 language allowing for exactly that. Surely, public policy cannot favor arbitration
24 agreements that can be enforced by millions of unknown parties and for claims that have
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1 no relation whatsoever to the services under which the original arbitration agreement is
2 entered. Agreements as overbroad as the ECS Arbitration Agreement are harmful and serve
3 as nothing more than a deterrent for consumers to seek justice.
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5 The totality of the circumstances surrounding Plaintiff's agreement to arbitrate
6 matters with ECS were procedurally unconscionable. Plaintiff had no ability to bargain with
7 ECS, and ECS represents the only free method through which Plaintiff can monitor his
8 Experian credit score and credit report. ECS built in a contractual "right" to unilaterally
9 amend the "agreement" at will, and the ECS Arbitration Agreement itself is an "infinite
10 arbitration clause." Moreover, due to its shocking overbreadth, the ECS runs directly
11 contrary to public policy interests. For these reasons, the Court should hold that the ECS
12 Arbitration Agreement is procedurally unconscionable and therefore unenforceable.
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15 **C. The Delegation Clause is Unconscionable Because It Is Unreasonably 16 Overbroad**

17 Plaintiff briefly discusses the delegation clause contained in the ECS Arbitration
18 Agreement. In circumstances where a party seeks to avoid an arbitration clause containing
19 a delegation clause, the party must challenge both the overall arbitration agreement and the
20 delegation provision. *See Oliver v. First Century Bank, N.A.*, No. 3:17-CV-00620-MMA-
21 KSC, 2018 WL 1426877, at *3 (S.D. Cal. Mar. 22, 2018) ("[T]he party seeking to avoid
22 arbitration bears the burden of raising specific arbitrability challenges, including a challenge
23 to the enforceability of a delegation clause.") (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561
24 U.S. 63, 72-74 (2010)). Here, the delegation clause found in the ECS Arbitration Agreement
25 is unconscionable for the same reasons outlined above with respect to the ECS Arbitration
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1 Agreement as a whole. Specifically, the class of parties who can allegedly enforce the
2 delegation clause are potentially innumerable, and their identities could not and cannot be
3 known to any party to this suit other than Experian. Accordingly, the delegation clause
4 should similarly be found to be both substantively and procedurally unconscionable, and
5 therefore unenforceable.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Plaintiff respectfully requests that the Court deny
9 Experian's Motion, and any other judgment the Court deems just and proper.

11 Date: May 16, 2023,

Respectfully submitted,

12 /s/ James Ristvedt

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28 *Attorneys for Plaintiff
Esteban Arciniega*

1 **CERTIFICATE OF SERVICE**
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I hereby certify that on May 16, 2023, I electronically filed the foregoing document
with the Clerk of the Court using the ECF system. Notice of such filing will be sent to all
attorneys of record in this matter.

6 */s/ Nataley Clark*
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